No. 15,162

IN THE

United States Court of Appeals

For the Ninth Circuit

BASILIO FUGIANI,

Appellant,

vs.

BRUCE G. BARBER, District Director, Immigration and Naturalization Service, San Francisco, California,

Appellee.

APPELLANT'S BRIEF.

JACKSON & HERTOGS,
580 Washington Street,
San Francisco 11, California,
Attorneys for Appellant.

Subject Index

Table of Authorities Cited

Statutes

Texts

No. 15,162

IN THE

United States Court of Appeals

For the Ninth Circuit

BASILIO FUGIANI,

Appellant,

vs.

BRUCE G. BARBER, District Director, Immigration and Naturalization Service, San Francisco, California,

Appellee.

APPELLANT'S BRIEF.

JURISDICTIONAL STATEMENT.

This is an appeal from an order of the District Court, dated April 3, 1956, dismissing appellant's complaint on the ground that judicial intervention is not warranted. (App. A.) The jurisdiction of the District Court was invoked under 5 U.S.C. 1009, and 28 U.S.C. 2201. This Court has jurisdiction on appeal under 28 U.S.C. 1291.

STATUTES INVOLVED.

Section 212 of the Immigration and Nationality Act of 1952, insofar as pertinent to the present proceedings, provides as follows:

"**Excludable classes of aliens; non-applicability to certain aliens; waiver of requirements; parole of aliens; report to Congress; suspension of entry by President.**

(a) Except as otherwise provided in this chapter, the following classes of aliens shall be ineligible to receive visas and shall be excluded from admission into the United States:

* * * *

(19) Any alien who seeks to procure, or has sought to procure, or has procured a visa or other documentation, or seeks to enter the United States, by fraud, or by willfully misrepresenting a material fact."

(66 Stat. 182; 8 U.S.C.A. 1182(a)(19).)

Section 242 of the Immigration and Nationality Act of 1952, insofar as pertinent to the present proceedings, provides as follows:

"**Apprehension and deportation of aliens—arrest and custody; review of determination by Court:**

* * * *

(b) A special inquiry officer shall conduct proceedings under this section to determine the deportability of any alien, and shall administer oaths, present and receive evidence, interrogate, examine, and cross-examine the alien or witnesses, and, as authorized by the Attorney General, shall make determinations, including orders of deportation. Determination of deportability in any case shall be made only upon a record made in a proceeding before a special inquiry officer, at which the alien shall have reasonable opportunity to be present, unless by reason of the alien's mental incompetency it is impracticable

for him to be present, in which case the Attorney General shall prescribe necessary and proper safeguards for the rights and privileges of such alien.

* * * *

(4) No decision of deportability shall be valid unless it is based upon reasonable, substantial, and probative evidence."

(66 Stat. 208, 8 U.S.C.A. 1252 (b).)

STATEMENT OF THE CASE.

Appellant is a native and citizen of Italy who was admitted to the United States as a nonimmigrant under Section 3(2) of the Immigration Act of 1924 at the Port of New York, New York, on February 22, 1950. On March 28, 1950, appellant married a citizen of the United States. Subsequently, he voluntarily appeared at the Immigration and Naturalization Service and applied for discretionary relief. Thereafter the Immigration and Naturalization Service granted the appellant the privilege of voluntary departure and preexamination, with an alternative order of deportation if he failed to avail himself of those privileges. (Exh. 1, Order Dated 9-24-52.) While processing his application for preexamination with the United States Consulate General, Vancouver, B. C., Canada, the appellant was informed by that office, in a letter dated November 25, 1952, that information on file at the Consulate General indicated that the appellant "was previously married to a German girl while he was a prisoner of war in Germany." (Exh. 2.)

Immediately following receipt of the foregoing information, appellant directed inquiries concerning this matter to his sister then residing in his native city of Fabriano, Province of Ancona, Italy. In letters dated December 6th and 8th, 1952, appellant was informed by his sister that the official records of the Township of Fabriano indicated that he (appellant) was married in Berlin, Germany in 1945 and that such record of marriage had been forwarded to the Township of Fabriano, Italy on March 20, 1950 by the Foreign Ministry at Rome. (Exh. 1 [Exh. A of hearing dated 8-4-53].) On February 6, 1953, an attorney in Fabriano, Italy, acting under authorization of the appellant, commenced an annulment action, seeking a decree declaring the purported marriage of appellant and one Elly Porg to be void and nonexistent on the ground that appellant at no time had an intention to contract matrimony with the person identified as Elly Porg and that the appellant at no time had conjugal relations with that individual. Trial of the foregoing matter was held in the appropriate Court of Italy, at Ancona on June 27, 1953, at which time the party identified as Elly Porg appeared and testified concerning the purported marriage. A decree annulling the marriage was entered on June 27, 1953, and recitals in such decree show the testimony of Elly Porg to the effect that appellant was tricked and deceived into marriage on the pretext that he was simply signing papers to obtain food; that there were no conjugal relations and that the deception as to appellant's marriage was not revealed to him. (Exh. 4.)

On July 29, 1953, a Special Inquiry Officer of the Immigration and Naturalization Service, San Francisco, California, without notice, entered an order directing that the deportation proceedings of the appellant be reopened and that the prior order granting voluntary departure with the additional privilege of preexamination be withdrawn. (Exh. 1, Order dated 7-29-53.) Following further hearings conducted by the Immigration and Naturalization Service, the Special Inquiry Officer directed that the appellant be deported from the United States since "the record in this case clearly indicates that the (appellant) attempted to obtain an immigration visa for admission to this country through fraud and that he carefully concealed from the authorities that he had been previously married." (Exh. 1, Order dated 9-25-53.) The order of the Special Inquiry Officer was affirmed by the Board of Immigration Appeals. (Exh. 1, Order dated 10-5-54.) It is from these decisions that judicial review is sought.

SPECIFICATION OF ERRORS.

That the District Court erred in concluding that the decision of the Immigration and Naturalization Service is based upon reasonable, substantial and probative evidence.

That the District Court erred in concluding that the appellant had been given a fair and impartial administrative hearing.

That the District Court erred in concluding that all of the circumstances disclosed in the record did not warrant judicial intervention.

SUMMARY OF ISSUES AND LEGAL ARGUMENT.

The sole question to be determined at this time is whether the appellant sought to procure a visa or other documentation by fraud or by wilfully misrepresenting a material fact, within the meaning of Section 212(a) (19) of the Immigration and Nationality Act. This issue is of vital importance, because if it is determined that such is the case appellant would thereafter be ineligible to obtain an immigration visa or reenter the United States even temporarily.

ARGUMENT.

JURISDICTION.

It has been held that an alien whose deportation has been ordered administratively under the Immigration and Nationality Act of 1952, 66 Stat. 163, 8 U.S.C.A. 1101, et seq., may obtain a judicial review of such order in a Federal District Court for a declaratory judgment and injunction under Section 10 of the Administrative Procedures Act, 66 Stat. 237, 243; 5 U.S.C.A. 1009.

Shaughnessy v. Pedreiro, 1955, 349 U.S. 48, 99 L. Ed. 868.

It has also been held that where the eligibility of an alien depends upon the status of the alien and where such status is in dispute, judicial review is available. *McGrath v. Kristensen,* 1950, 340 U.S. 162, 169; 95 L. Ed. 173.

CONSEQUENCES OF THE ADMINISTRATIVE DECISION.

The administrative record in this case shows that the appellant was, in September, 1953, found eligible for the privilege of voluntary departure and preexamination. Preexamination is an administrative process whereby it is possible for an alien in this country, under certain circumstances, to secure an administrative determination of his eligibility for lawful readmission to this country for permanent residence prior to his departure. That privilege was withdrawn in this particular case when the Special Inquiry Officer concluded that the appellant was an alien ineligible for readmission on the ground that he was a person excludable under the statutory provisions of Section 212(a)(19) of the Immigration and Nationality Act of 1952. The violator of that provision is permanently barred from entry into the United States. Once an alien comes within the confines of that section he may not thereafter, except in limited cases which are not applicable here, ever legally enter the United States. The severity of the penalty imposed by that section causes the appellant to seek review of the administrative determination at this time.

In the instant matter, unless the appellant can remove the administrative determination that he is in-

eligible for readmission to the United States under Section 212(a)(19), he will be forever barred from rejoining the citizen members of his immediate family in the United States. The factual situation here will clearly establish that this appellant at no time sought to procure an immigration visa or any other documentation to enter the United States by fraud or by wilful misrepresentation of a material fact.

FRAUD AND WILFUL MISREPRESENTATION.

Although the language of the statute is in the disjunctive, it is believed that the word "fraud" and the term "wilful misrepresentation" present two alternatives that are not substantially dissimilar. The phrase "wilful misrepresentation" should be read as requiring the misrepresentation to be of the same quality as does fraud. This result can readily be reached if the term "wilful" requires that the misrepresentation be made with knowledge and with actual intent to deceive.

The term "fraud" is not defined in the Immigration and Nationality Act. It should, therefore, be given its commonly accepted legal construction, that is—as consisting of false misrepresentations of a material fact made with knowledge of its falsity and with intent to deceive the other party.

U. S. v. U. S. Cartridge Co., 95 F. Supp. 384, 385, affirmed 198 F. 2d 456, Cert. denied, 345 U.S. 910.

In *Tucker's Lessee v. Moreland,* 1836, 35 U.S. 58, 78, 9 L. Ed. 345, Mr. Justice Story stated:

> "Fraud is not presumed, either as a matter of law or fact, unless under circumstances not fairly susceptible of any other interpretation."

More than a century later, Mr. Justice Minton in *United States v. Wunderlich,* 1951, 342 U.S. 98, 100, 96 L. Ed. 113, expressed the same view that:

> "By fraud we mean conscious wrongdoing, an intention to cheat or be dishonest. * * * fraud should be alleged and proved, as it is never presumed."

Consequently, fraud is not established by proving that an incorrect statement was made. Proof of knowledge and actual intent to deceive are essential elements.

See

Pinkus v. Walker, 338 U.S. 269, 276-277, 94 L. Ed. 63.

In *Bridges v. Wixon,* 326 U.S. 135, 147, 89 L. Ed. 2103, the Supreme Court held:

> "In that connection it must be remembered that although deportation technically is not criminal punishment (citations), it may nevertheless visit as great a hardship as deprivation of the right to pursue a vocation or a calling. (citations) As stated by Mr. Justice Brandeis speaking for the Court in Ng Fung Ho v. White, 259 US 276, 284, 66 L. Ed. 938, 942, 42 S. Ct. 492, deportation may result in the loss 'of all that makes life worth living.' "

The Court of Appeals for the Tenth Circuit in *Pacific Royalty Company v. Williams,* 227 F. 2d 49 at page 55 stated:

> "The essential elements of actionable fraud are a false representation of a material fact, knowledge of its falsity when made, intent to deceive, and reliance thereon with resulting damages. 17 Words and Phrases, Fraud, p. 522; 37 C.J.S., Fraud, Sec. 3; Southern Development Co. of Nevada v. Silva, 125 U.S. 247, 8 S. Ct. 881, 31 L. Ed. 678; Davis v. Wilson, 8 Cir., 276 F. 672; Pace v. Parish, Utah, 247 P. 2d 273; Wishnick v. Frye, 111 Cal. App. 2d 926, 245 P. 2d 532; Thompson v. Teel, 204 Okl. 105, 226 P. 2d 395; Koen v. Cavanagh, 70 Ariz. 389, 222 P. 2d 630. Fraud will never be presumed and will be sustained only upon evidence that is clear and convincing. 37 C.J.S., Fraud, Sec. 114; Southern Development Company v. Silva, supra; Union Railroad Co. v. Dull, 124 U.S. 173, 8 S. Ct. 433, 31 L. Ed. 417; Davis v. C.K.R., 10 Cir., 184 F. 2d 86; Greene v. Esquibel, 58 N. Mex. 429, 272 P. 2d 330; Jones v. Citizens Bank of Clovis, 58 N. Mex. 48, 265 P. 2d 366; Frear v. Roberts, 51 N. Mex. 137, 179 P. 2d 998; Consolidated Placers, Inc., v. Grant, 48 N. Mex. 340, 151 P. 2d 48."

In this case, appellant admits that he notified both the Immigration and Naturalization Service and the American Consulate General at Vancouver, that he had never been previously married. However, there is a complete absence of any evidence that the appellant knew, or had any reason to know, or that he believed that he had ever been previously married. Matter of fact, there is reasonable, substantial and

probative evidence which clearly establishes that this appellant, prior to November of 1952, had no knowledge whatsoever concerning the marriage alluded to in the administrative decision. This significant fact is completely ignored in that decision.

The administratve agency has "over-stepped the boundaries of interpretation" and hence has exceeded the statutory authority. *F.C.C. v. American Broadcasting Co.,* 1954, 347 U.S. 284, 296, 98 L. Ed. 699. The action taken falls within the judicial construction of denial of due process of law. Cf. *Shaughnessy v. Mezei,* 1953, 345 U.S. 206, 97 L. Ed. 956; *Joint Anti-Fascist Refugee Committee v. McGrath,* 1951, 341 U.S. 123, 95 L. Ed. 817; *Wong Yang Sung v. McGrath,* 1950, 339 U.S. 33, 94 L. Ed. 616.

APPELLANT'S MARITAL HISTORY.

Appellant was born in Italy on February 28, 1915. During World War II, he was inducted into the armed forces of Italy, and was taken prisoner by the German army after the fall of Mussolini and the refusal of the Italian army to fight with Germany. Taken to Berlin in March, 1943 (Exh. 1. [P. 11, hearing dated 8-4-53]), he was held prisoner by the Germans until the fall of Berlin, when he came into the hands of the Russians. With three other Italian prisoners of war, he escaped from the prison camp and all four took refuge in a home in Berlin, occupied by one Elly Porg and her father. They remained in hiding in the attic of this home for approximately two weeks, and appellant left it only when he was able to escape

and make his way at night to the American Zone. (Exh. 1. [P. 16, hearing dated 8-4-53.]) While at the Porg home, Mr. Porg suggested that the four escaped prisoners sign papers in order to obtain food. Appellant and his three compatriots all signed some papers at that time, such papers being in the German language which none of them could speak or read. (Exh. 1. [P. 15, hearing dated 8-4-53.]) It was asserted that they communicated with Mr. Porg and his daughter by drawing pictures on paper. (Exh. 1. [P. 15, hearing dated 8-4-53.]) Appellant remained in the American Zone for about ten days, was given food, a physical examination and repatriated to Italy.

On December 12, 1949, respondent was issued an Italian passport by the police at Fabriano, Province of Ancona, Italy. (Exh. 1. [P. 22, hearing dated 8-7-53.]) This passport showed him to be single. It is the practice in Italy to annotate birth records to show the marriage of the subject. (Exh. 1. [P. 16, hearing dated 8-4-53.]) Appellant's birth record was so annotated when the record of the alleged marriage of the appellant and Elly Porg was forwarded to the Township of Fabriano, under date of March 20, 1950, by the Foreign Ministry at Rome, a date which was subsequent to appellant's arrival and admission to this country.

On November 25, 1952, the United States Consul James E. Callahan, at Vancouver, wrote appellant's representative that information contained in his file indicated that the appellant was previously married to a German girl while he was a prisoner of war in Germany. Appellant has asserted that this was the

first information that he ever received that he had been previously married. (Exh. 1. [P. 17, hearing dated 8-4-53.]) Immediately upon receipt of the letter of the Consulate, appellant wrote to his sister in his native city, and asked her assistance. His sister replied on December 6th and December 8, 1952. An annulment proceeding was filed in appellant's behalf on February 6, 1953 and a decree of annulment (after trial was held at Ancona, Italy at which time the girl Elly Porg appeared and testified) was entered on June 29, 1953. The Italian Court found that there had been no conjugal relations; that the appellant was deceived into marriage and that the appellant did not know that he was contracting marriage when he executed certain documents in the German language while he was an escaped prisoner of war in Germany. We submit that every action taken by appellant is completely in accord with his repeated contention that he knew nothing of this purported marriage until advised by the United States Consulate General at Vancouver, that a record of such marriage existed in Italy. Both parties to the "ceremony" testified under oath in two separate and different proceedings that the appellant did not intend to be married and that the appellant did not know that he was taking part in any act which constituted a marriage. Further, the judgment of the Italian Court embodies recitals which clearly support appellant's contentions.

It is well realized that the full faith and credit provisions of the Constitution of the United States have no application to foreign judgments, but generally as a matter of comity judgments of foreign

courts are given conclusive effect and full faith and credit, provided such judgments are not tainted with fraud. Following the general rule that the laws of one nation will, by what is termed the comity of nations, be recognized by another, except under certain circumstances, the administrative decision now under consideration, which completely disregards the uncontroverted judicial decision of the Court of Italy, is wanting in due process of law. Section 242 of the Immigration and Nationality Act sets forth the statutory requirement that "no decision of deportability shall be valid unless it is based upon reasonable, substantial and probative evidence." Applying that principle to the factual situation in the matter now before the Court, it must be determined that the conclusions of the administrative decision are unsound and without foundation as a matter of law.

In the leading case of *Hilton v. Guyot,* 159 U.S. 133, 202, 16 S. Ct. 139 (40 L. Ed. 95), the Supreme Court lays down the following rule for impeachment of judgments of courts of foreign countries:

> "Where there has been opportunity for a full and fair trial abroad before a court of competent jurisdiction, conducting the trial upon regular proceedings, after due citation or voluntary appearance of the defendant, and under a system of jurisprudence likely to secure an impartial administration of justice between the citizens of its own country and those of other countries, and there is nothing to show either prejudice in the court, or in the system of laws under which it was sitting, or fraud in procuring the judgment, or any other special reason why the comity of

> this nation should not allow it full effect, the merits of the case should not, in an action brought in this country upon the judgment, be tried afresh, as on a new trial or an appeal, upon the mere assertion of the party that the judgment was erroneous in law or in fact."

The holding in the *Hilton* case, supra, is set forth with more particularity in the syllabus at 159 U.S. 133, as follows:

> "When * * * the foreign judgment appears to have been rendered by a competent court, having jurisdiction of the cause and of the parties, and upon due allegations and proofs, and opportunity to defend against them, and its proceedings are according to the courts of civilized jurisprudence, and are stated in clear and formal record, the judgment is *prima facie* evidence, at least, of the truth of the matter adjudged; and the judgment is conclusive upon the merits tried in the foreign court, unless some special ground is shown for impeaching it, as by showing that it was affected by fraud or prejudice, or that by the principles of international law, and by the comity of our own country, it is not entitled to full credit and effect."

Unless some special ground for impeaching it is shown, the doctrine now generally prevails in this country that a foreign judgment is conclusive on its merits and not open to review or reexamination, if it was rendered by a Court of competent jurisdiction, if it was free from fraud and if the system under which the case was tried in the foreign court is likely to secure the impartial administration of justice.

50 *C.J.S.* 545, 546.

Also compare:

Ingenohl v. Olsen & Co., 273 U.S. 541, 71 L. Ed. 762;

Aetna Life Insurance Company v. Tremblay, 223 U.S. 185, 56 L. Ed. 398;

Spann v. Compania Mexicana Radiodifusora Fronteriza, 5 Cir., 1942, 131 F. 2d 609.

The Supreme Court of California in *Rediker v. Rediker,* 35 Cal. 2d 796, 221 P. 2d 1, held that a foreign decree of divorce would be entitled to as much force and effect in California as a decree of a sister State under the full faith and credit provisions of the Constitution of the United States. Appellant's present marriage would not be subject to collateral attack under the laws of the State of California. However, the administrative decision which concludes that the appellant knowingly and wilfully failed to reveal the facts of the purported marriage in effect finds the judicial determination of the Italian Court that the appellant was deceived and had no knowledge of such marriage to have no substantive, evidentiary value. In a recent decision, Justice Schauer of the California Supreme Court said:

> "The public policy of this State, in the circumstances of this case, as in those considered in the Rediker v. Rediker (supra) requires recognition of the second marriage rather than the 'dubious attempt to resurrect the original' marriage."
>
> *Dietrich v. Dietrich,* 41 Cal. 2d 497.

See also:

Watson v. Watson, 39 Cal. 2d 305, 307, 246 Pac. 2d 19.

Where, as in the instant case, the jurisdiction of the foreign court is exercised according to the rules of international law, where the parties had their domicile within its forum, the foreign decree dissolving the marriage ought to be respected by the tribunals of all other countries. In the administrative proceedings now being questioned, the Special Inquiry Officer resorted to speculation and conjecture, without considering the evidence, in reaching his conclusion that the appellant deliberately concealed the facts of the purported marriage. There is no evidence to support his conclusion.

Findings to be valid cannot be based upon hearsay alone, nor upon hearsay corroborated by a mere scintilla. The test is whether in the individual case before the Court there is "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion."

Willapoint Oysters v. Ewing, 9 Cir., 1949, 174 F. 2d 676, 691, Cert. den. 338 U.S. 860, 94 L. Ed. 527.

The administrative finding made herein was contrary to the "indisputable character of the evidence" which was offered in this matter.

Interstate Commerce Commission v. Louisville and Nashville Railroad Co., 227 U.S. 88, 91, 57 L. Ed. 431.

Compare:

Kwock Jan Fat v. White, 253 U.S. 454, 64 L. Ed. 1010;

Chin Yow v. United States, 208 U.S. 8, 52 L. Ed. 369.

The Supreme Court of the United States has held—"Where the fate of a human being is at stake, as, for example, the deportation of an alien, the presence of an essential evil purpose may not be left to conjecture." *Bridges v. Wixon,* supra.

The evidence of record does not sustain any administrative allegation that there was fraud or wilful misrepresentation on the part of the appellant at the time he sought to secure an immigration visa in order to properly reenter the United States for permanent residence. On the other hand, there is reasonable, substantial and probative evidence to support the appellant's contention that he never had any prior knowledge concerning the alleged marriage in Berlin, and such evidence stands uncontroverted in the record.

CONCLUSIONS.

Failure of the Immigration and Naturalization Service to comply with the statutory requirements of Section 242 of the Immigration and Nationality Act is a denial of procedural due process of law. It is a recognized rule that recitals in a judgment are presumed to be true and correct unless controverted by other parts of the record, and one who seeks to collaterally attack such judgment rendered by a Court of competent jurisdiction bears a heavy burden of proof —there is not a mere scintilla of evidence which meets this burden.

We do not believe that the immigration and naturalization laws of the United States contemplate in-

fliction of a penalty so severe and perpetual, as the administrative decision entered in this matter, on nothing more than inference, speculation and conjecture.

PRAYER.

WHEREFORE, appellant, Basilio Fugiani, prays that this Court make a judicial determination that he is not an alien who has sought to secure an immigration visa by fraud or wilful misrepresentation and that the matter be remanded to the defendant for further proceedings in conformity therewith.

Dated, San Francisco, California,
February 11, 1957.

Respectfully submitted,
JACKSON & HERTOGS,
By JOSEPH H. HERTOGS,
Attorneys for Appellant.

(Appendix A Follows.)

Appendix "A"

Appendix A

Original filed April 3, 1956.
Clerk, U. S. Dist. Court,
San Francisco.

In the United States District Court
For the Northern District of California
Southern Division

No. 34263

Basilio Fugiani,
Plaintiff,
vs.
Bruce G. Barber, District Director, Immigration and Naturalization Service, San Francisco, California,
Defendant.

ORDER FOR JUDGMENT

Petitioner was admitted to the United States at New York as a temporary visitor on February 28, 1950 for a period to expire June 1, 1950. He promptly came to San Francisco and equally promptly married an American citizen spouse on March 29, 1950. He did not depart as required, when his visiting privilege expired.

He is, and has been since June 1, 1950, illegally in the United States and at all times subject to deportation under the Act of May 26, 1924.

While admitting his deportability, he has sought suspension of deportation on the ground of economic hardship. This was denied by the District Director of Immigration and his decision was affirmed by the Board of Immigration Appeals. The denial was principally on the basis that petitioner perjured himself in his application by denial of any previous marriage.

He petitions this Court for review (60 Stat. 243, 5 USC 1009) and prays that his case be remanded for reconsideration.

I find no merit in the petition. The hearing officer's findings are based upon testimony of the petitioner, which the officer found to be incredible. The Board of Appeals affirmed on the ground that the record justified the finding. Under all the circumstances disclosed in the record, judicial intervention is not warranted.

The petition is dismissed. Present findings and appropriate judgment.

Dated, April 3, 1956.

Louis E. Goodman,
United States District Judge.